JUVENILE LIFE WITHOUT PAROLE POST-*MILLER*: THE LONG, TREACHEROUS ROAD TOWARDS A CATEGORICAL RULE

I. INTRODUCING THE "NEW" EIGHTH AMENDMENT

For the better part of a decade, life without the possibility of parole ("LWOP") has been the United States' harshest constitutional penalty for juvenile crimes.[1] Recently, the Supreme Court has begun to subject juvenile LWOP sentences to significant Eighth Amendment scrutiny.[2] In *Graham v. Florida*,[3] the Court held that imposing LWOP for juvenile acts not amounting to homicide violates the Cruel and Unusual Punishments Clause.[4] Juveniles, Justice Kennedy explained, "are less deserving of the most severe punishments" because the realities of childhood and lack of maturity in adolescence make them categorically less culpable than adults for the same conduct.[5]

Notwithstanding its seemingly universal language about juvenile culpability, *Graham*'s insistence on distinguishing between homicide and non-homicide crimes meant that, by the summer of 2012, there were still roughly 2,500 prisoners in the United States serving LWOP for homicides they committed as juveniles.[6] *Miller v. Alabama*,[7] decided in June 2012, gave some of these prisoners a measure of hope. In *Miller*, the Court

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1. *See* Roper v. Simmons, 543 U.S. 551, 575, 578 (2005) (finding death to be categorically cruel and unusual punishment when meted out on offenders who committed their crimes as juveniles); *see also infra* Part II.B.1 (discussing the Court's opinion in *Roper*).

2. This scrutiny fits into the larger trend of giving youth greater constitutional salience in criminal proceedings. For example, the court recently held that a suspect's age is relevant to the objective custody analysis under *Miranda v. Arizona*. J.D.B. v. North Carolina, 131 S. Ct. 2394, 2406 (2011). So long as police know, or should know, that the suspect is a juvenile, courts must now consider the suspect's age when determining whether a reasonable person would feel free to leave. *Id.* at 2402–03, 2406. In other words, *J.D.B.* creates what some have called a reasonable juvenile standard. *E.g.* Hillary B. Farber, J.D.B. v. North Carolina*: Ushering in a New "Age" of Custody Analysis Under* Miranda, 20 J.L. & POL'Y 117, 144 (2011); Marsha Levick, J.D.B. v. North Carolina*: The U.S. Supreme Court Heralds the Emergence of the "Reasonable Juvenile" in American Criminal Law*, 89 CRIM. L. REP. 753, 753 (2011). In reaching its "commonsense" holding in *J.D.B.*, the Court relied upon the same core differences between juveniles and adults that it has cited in its recent juvenile sentencing cases. *J.D.B.*, 131 S. Ct. at 2403. *See infra* text accompanying notes 76–80 (discussing the Court's treatment of these differences in its juvenile sentencing opinions).

3. 130 S. Ct. 2011 (2010). *Graham* is scheduled for publication at 560 U.S. 48.

4. *Id.* at 2034.

5. *Id.* at 2026.

6. Melinda Tuhus, *Supreme Court Ruling Bars Mandatory Life Sentences for Juveniles*, BETWEEN THE LINES (July 4, 2012), http://btlonline.org/2012/seg/120713bf-btl-mauer.html (interviewing Marc Mauer, Executive Director of the Sentencing Project).

7. 132 S. Ct. 2455 (2012).

announced "children are different"[8] and, consequently, the Eighth Amendment prohibits *mandatory* LWOP for juvenile homicide offenders.[9] Writing for a 5–4 majority, Justice Kagan drew a direct analogy between juvenile LWOP and the death penalty. Justice Kagan concluded that juvenile LWOP sentences, like death sentences, may not be imposed without an individualized sentencing determination.[10]

In the wake of *Miller* and *Graham*, some commentators have suggested that we now live under a "new" Eighth Amendment,[11] one where judicial scrutiny has finally slipped the shackles of the "death is different" doctrine and where proportionality could have serious teeth in non-capital cases.[12] Certainly, these cases give cause for some optimism.[13] Prior to *Graham*, the Supreme Court had never categorically invalidated a sentence other than death under the Cruel and Unusual Punishments Clause.[14] In just over two years, the Court did it twice.[15]

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8. *Id.* at 2470.

9. *See id.* at 2469.

10. *Id.* at 2463, 2466–67; *cf.* Woodson v. North Carolina, 428 U.S. 280, 303–05 (1976) (plurality opinion) (finding that constitutional imposition of the death penalty requires "particularized consideration of relevant aspects of the character and record of each convicted defendant").

11. *E.g.*, Douglas A. Berman, Graham *and* Miller *and the Eighth Amendment's Uncertain Future*, 27 CRIM. JUST., Winter 2013, at 19, 25.

12. Professor Berman contends that "the Court's decision in [*Miller* and *Graham*] to start applying its broadest Eighth Amendment doctrines to noncapital sentences changes both the playing field and the stakes for constitutional review of individual sentencing outcomes and state punishment policies." *Id.* at 23. *See also* Julia L. Torti, Note, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. REV. 1908, 1915 (2013) ("*Graham* and *Miller* may indicate that a more probing analysis of the severity of punishments is permissible or even encouraged."); *cf.* Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 39 (2012) ("The larger question raised by *Graham* and *Miller* is whether the Court, having twice invalidated noncapital sentences, is prepared to embark upon an invigorated Eighth Amendment jurisprudence outside the juvenile context.").

13. This Note accepts that the categorical differences between juveniles and adults, including comparatively diminished culpability and greater capacity for reform, require categorically different sentencing rules for juveniles and, thus, endorses wholesale elimination of juvenile LWOP from the American sentencing lexicon.

14. *See* Graham v. Florida, 130 S. Ct. 2011, 2046 (2010) (Thomas, J., dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone."); *cf.* discussion *infra* note 40 (describing the historical difficulty of proving that a term of incarceration violates the Eighth Amendment under the "grossly disproportionate" standard).

15. One interpretation of *Miller* is that it erected a categorical bar against mandatory juvenile LWOP sentences. One could also interpret the opinion to explain where an otherwise permissible sentence (juvenile LWOP) is procedurally defective (when it is mandatory). This distinction is not trivial and lies near the heart of the debate over whether *Miller*'s holding should apply retroactively. *See* discussion *infra* note 224 (discussing the state of the retroactivity debate); *see also* Molly F. Martinson, *Negotiating* Miller *Madness: Why North Carolina Gets Juvenile Resentencing Right While Other States Drop the Ball*, 91 N.C. L. REV. 2179, 2190–97 (2013) (examining arguments for and against *Miller* retroactivity).

At the same time, *Miller*'s reasoning should give pause to those seeking to eradicate juvenile LWOP entirely and to bring the United States in line with international standards of juvenile justice. Like *Graham*, *Miller* presented a chance for the Court to unveil the blanket prohibition on juvenile LWOP many advocates seek. And, again, it became a chance not taken.[16] Instead, the *Miller* Court stepped away from the traditional Eighth Amendment decency analysis, entirely neglected the international community, and lashed juvenile LWOP to the death-penalty mast. In so doing, the Court signaled that a comprehensive Eighth Amendment bar against all juvenile LWOP sentences is still a long way off.

This Note attempts to situate *Miller* within the Court's recent juvenile sentencing jurisprudence and predict its trajectory. Part II tells a condensed story of United States juvenile sentencing law and traces its customary decency analysis through the Court's recent decisions. Part III surveys the *Miller* decision and analyzes its reasoning. Part IV explores *Miller*'s wholesale omission of international law and opinion, arguing that the Court could have (and perhaps should have) relied upon an emerging *jus cogens* norm against juvenile LWOP to strike down all such sentences. Finally, Part V discusses the possible ramifications of *Miller*'s holding and reasoning for efforts to abolish juvenile LWOP. This Note reluctantly concludes that advocates may want to devote less time and energy to the constitutional litigation that has served them so well up to this point.

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16. Since *Graham* was decided in 2010, much ink has been spilled calling for the Court to strike down all juvenile LWOP sentences. *See generally* Mary Berkheiser, *Developmental Detour: How the Minimalism of* Miller v. Alabama *Led the Court's "Kids are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489, 491 (2013) (castigating the *Miller* Court for failing "to rule categorically that the Eighth Amendment prohibits the imposition of life without parole on a juvenile regardless of the crime"); Marina Ann Magnuson, *Taking Lives: How the United States has Violated the International Covenant of Civil and Political Rights by Sentencing Juveniles to Life Without Parole*, 14 U.C. DAVIS J. JUV. L. & POL'Y 163, 188–89 (2010); Natalie Pifer, Note, *Is Life the Same as Death?: Implications of* Graham v. Florida, Roper v. Simmons, *and* Atkins v. Virginia *on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOY. L.A. L. REV. 1495, 1512 (2010); Lisa S. Yun, Note, *The United States Stands Alone: An International Consensus Against Juvenile Life Without Parole Sentences*, 20 S. CAL. INTERDISC. L.J. 727, 743 (2011). As the face of some of these articles suggests, widespread international opposition to the United States' punishment of its youths has been a major arguing point. Even after *Miller*, U.S. juvenile sentencing law is internationally backwards—the United States remains one of only two countries on earth that has not officially denounced juvenile LWOP on the world stage. *See* text accompanying *infra* note 159 (discussing the widespread ratification of the United Nations Convention on the Rights of the Child).

II. SENTENCING JUVENILES IN AMERICA: AN ABRIDGED HISTORY

To discuss the development of juvenile sentencing in the United States it is necessary to have a two-part conversation. The first part deals with decisions that occur before any criminal charges are filed, and asks how states can escape the juvenile justice systems *they* created and can impose adult penalties on juvenile offenders. The second part deals with how the courts evaluate the constitutionality of juvenile sentences after sentencing.

A. The Rise and Ramifications of Juvenile Courts

For roughly the first half of the nation's history, there was no separate system of juvenile justice in the United States.[17] Rather, the states universally tried children and teens in the same courts as adults and theoretically exposed them to the same penalties.[18] According to Craig S. Lerner, however, children under fourteen were often shielded from criminal liability by a rebuttable presumption that they lacked the capacity to act with the requisite mens rea.[19] Prosecutors could overcome the presumption with a showing of sufficient malice, applying the Latin maxim *malitia supplet ætatem*[20] (literally, "malice supplies age"[21]). The question of what weight to give to the offender's youth was determined by the sentencer on a case-by-case basis.[22]

With the advent of juvenile courts, came development of distinct juvenile punishment. Some punishments, such as detention in juvenile facilities, are analogous to adult criminal penalties.[23] Many juvenile courts, however, sentence juveniles with kid gloves, employing creative

17. Juvenile courts did not exist until 1899, when the first one sprang up in the Chicago area. SAMUEL DAVIS, RIGHTS OF JUVENILES, § 1:1 (2012). Initially, these new courts were unique, non-adversary fora. *See id.* § 1:2. In the last fifty years, however, the Supreme Court has insisted that juvenile systems adhere to certain principles of due process, imposing some of the "trappings of [adult] criminal process" on the juvenile courts. *Id.* § 1:3. *See generally In re* Gault, 387 U.S. 1 (1967) (requiring notice of charges, the right to counsel, and the right to confront and cross-examine in juvenile proceedings).

18. *See* Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309, 318–19 (2011) (noting that, while infrequent, early American courts occasionally sentenced juveniles to death).

19. *See id.* at 317–18.

20. *See id.*

21. William Whitaker, *Malitia Supplet Aetatem*, WORDS, http://www.archives.nd.edu/cgi-bin/words.exe?malitia+supplet+ aetatem (last visited Nov. 16, 2013).

22. *See* Lerner, *supra* note 18, at 316.

23. *See* DAVIS, *supra* note 17, § 7:3.

alternatives to institutional detention, such as: group therapy,[24] halfway houses,[25] and limiting the ability of the delinquent juvenile to associate with certain persons.[26] Philosophical opposition to lengthy detention is so strong that when courts decide to commit an offender to a juvenile institution, the Uniform Juvenile Court Act[27] limits individual terms to two years, renewable only after a hearing.[28]

Following the explosion of juvenile, violent crime rates in the 1980s and 1990s, almost all states sought to impose harsher criminal penalties on exceptionally violent youths.[29] The response to these so-called "superpredators"[30] was a proliferation of statutes permitting them to be prosecuted as adults.[31] While these state laws operate in different ways,[32] they all act to divest juvenile courts of jurisdiction and expose youths to adult sentencing schemes[33] with many states adopting mandatory

24. *See id.*; *cf.* Solomon Moore, *Missouri System Treats Juvenile Offenders With Lighter Hand*, N.Y. TIMES, Mar. 27, 2009, at A13, *available at* http://www.nytimes.com/2009/03/27/us/27juvenile.html ("Some states have worked at the county level to avoid confinement altogether, keeping youths in their communities while they receive rehabilitative services."). A practical advantage of alternative solutions to juvenile detention is, of course, reduced cost to the state. *Id.*

25. *See* DAVIS, *supra* note 17, § 7:3; *cf.* Moore, *supra* note 24 (discussing kinder, group-home facilities).

26. *See* DAVIS, *supra* note 17, § 7:3. This approach occasionally raises First Amendment issues. *Id.*

27. NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM JUVENILE COURT ACT (1968).

28. *Id.* § 36.

29. *See* Ethan Bronner, *Sentencing Ruling Reflects Rethinking on Juvenile Justice*, N.Y. TIMES, June 27, 2012, at A14, *available at* http://www.nytimes.com/2012/06/27/us/news-analysis-ruling-reflects-rethinking-on-juvenile-justice.html. Elizabeth S. Scott calls the public reactions of this period "Moral Panics." Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 537 (2013).

30. *E.g.*, Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19. "Superpredators" were defined as "radically impulsive, brutally remorseless youngsters . . . who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders." *Id.*

31. *See* Bronner, *supra* note 29, at A14.

32. Some provisions vest the decision about whether a youth will be tried as an adult wholly in the prosecutor handling the case. *See, e.g.*, FLA. STAT. § 985.557(1)(a) (2011). The statute provides: "With respect to any child who was 14 or 15 years of age at the time the alleged offense was committed, the state attorney may file an information when in the state attorney's *judgment and discretion* the public interest requires that adult sanctions be considered or imposed." *Id.* (emphasis added). The statute then enumerates offenses for which this discretion is granted, mostly offenses that involve violence or stealing. *See id.* Other statutory provisions designate offenses for which juveniles of a certain age *must* be tried as adults. *See, e.g.*, ALA. CODE § 12-15-204 (2012). Sometimes both of these provisions appear in the same statute. *E.g.*, FLA. STAT. § 985.557(1)(b).

33. In a recent report, the Attorney General's National Task Force on Children Exposed to Violence released a series of recommendations which, *inter alia*, opposed both of these practices. *See* ATT'Y GEN.'S NAT'L TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, DEFENDING CHILDHOOD: PROTECT, HEAL, THRIVE (Dec. 12, 2012), *available at* http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf (last visited Nov. 16, 2013). The task force concluded: "Laws and regulations

sentencing around the same time as these jurisdictional statutes.[34] Indeed, in many states it is still possible for juveniles charged with violent offenses to be mandatorily tried in adult court and to receive mandatory adult penalties.[35] Permitting youths to ride this fast track to states' harshest criminal penalties can pervert the entire concept of *juvenile* justice.[36]

B. Evolving Standards of Decency

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[37] The Court currently understands the Cruel and Unusual Punishments Clause to contain a "narrow proportionality principle."[38] That

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prosecuting [juvenile offenders] as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore and diminish their capacity to grow must be replaced or abandoned." *Id.* at 23.

34. *See generally* Philip Oliss, *Mandatory Minimum Sentencing: Discretion, the Safety Valve, and the Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1852–53 (1995) (describing the proliferation of tough-on-crime mandatory sentencing schemes in the 1980s).

35. For example, in Alabama, a 16-year-old who commits an armed assault must be tried as an adult, ALA. CODE § 12-15-204(a)(3), and must be imprisoned for at least two years, ALA. CODE § 13A-6-21 (2012); ALA. CODE § 13A-5-6 (2012). The circumstances simply do not matter.

36. Imposing adult criminal penalties on juvenile offenders often means sending juveniles to adult prisons, where they face disproportionate levels of abuse and psychological torment. *See* Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults after* Graham *and* Miller, 61 EMORY L.J. 1445, 1450–58 (2012); *cf. Children in Adult Prison*, EQUAL JUSTICE INITIATIVE, http://eji.org/childrenprison (last visited Nov. 16, 2013) (describing the approach of many states to juvenile criminal punishment as "subject[ing] kids to further victimization and abuse" rather than responding to the "crisis and dysfunction that creates child delinquency").

37. U.S. CONST. amend. VIII.

38. Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in the judgment). The notion of Eighth Amendment proportionality in Supreme Court case law dates at least to the early twentieth century. *See* Weems v. United States, 217 U.S. 349, 367 (1910) (accepting a "precept of justice that punishment for crime should be graduated and proportioned to offense"). *Weems* considered a sentence under a Philippine statute of fifteen-years hard labor for falsifying a single government document. *Id.* at 357–58.

Whether, and to what extent, the Eighth Amendment contains a proportionality principle has been the subject of heated debate. The Court's originalist justices vehemently argue that no proportionality principle can exist because it would be inconsistent with the Framers' understanding of what could constitute a cruel or unusual punishment. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2483 (2012) (Thomas, J., dissenting); *Harmelin*, 501 U.S at 965 (plurality opinion of Scalia, J.). The common refrain is that the clause considers only "methods of punishment." *E.g.*, Graham v. Florida, 130 S. Ct. 2011, 2044 (2010) (Thomas, J., dissenting); *Harmelin*, 501 U.S. at 979. In *Harmelin*, Justice Scalia claims that the Framers were quite familiar with the concept of proportionality in punishment and would have included the word if they intended for the Eighth Amendment to have such content. *Harmelin*, 501 U.S. at 977.

By contrast, for the argument that the Cruel and Unusual Punishments Clause contains a proportionality principle, and a broad one at that, see generally John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899 (2011). *See also* JOHN PAUL STEVENS, FIVE CHIEFS: A SUPREME COURT MEMOIR 224 (2011) (pointing out that

is, not every sentence that seems excessively harsh qualifies as cruel and unusual. Traditionally, the Court has employed a bifurcated mode of proportionality analysis, applying much stricter rules for capital sentences—leading to the axiom, "death is different."[39] By contrast, when facing a term of incarceration, an offender must show that her sentence is "grossly disproportionate" to implicate Eighth Amendment protections.[40]

In *Trop v. Dulles*,[41] a plurality of the Court first announced the test for whether a death sentence is unconstitutionally disproportionate—whether that sentence offends "the evolving standards of decency that mark the progress of a maturing society."[42] The relevant, evolving standards are those of the present.[43] Present standards are demonstrated by objective evidence, to the greatest extent possible.[44] To identify these standards, the Court developed a two-pronged mode of analysis for death penalty cases. First, the Court looks for evidence of national consensus against the punishment in domestic "legislative enactments and state practice."[45] In light of this evidence, the Court then makes "its own independent judgment whether the punishment in question violates the Constitution."[46]

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judicial proportionality determinations would not have troubled the framers in the slightest, as they clearly included proportionality in the bail and fines portions of the Eighth Amendment). Additionally, Justice Stevens hails Chief Justice Roberts for breaking with his predecessors and acknowledging some form of Eighth Amendment proportionality. *Id.* at 221.

39. *See generally* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117–19 (2004) (describing the elevated status of the death penalty in the Court's Eighth Amendment jurisprudence). Abramson compiles a list of the numerous occasions where the Court has used language resembling "death is different." *Id.* at 117 n.1.

40. *Harmelin*, 501 U.S. at 1000–01. Gross disproportionality has proved to be an exceedingly difficult standard to satisfy. *See* Lerner, *supra* note 18, at 311 (noting that *Graham* was the first time in nearly thirty years that the Court overturned a term-of-years sentence).

41. 356 U.S. 86 (1958).

42. *Id.* at 101 (plurality opinion). This language was later adopted by the majority in Estelle v. Gamble, 429 U.S. 97, 102 (1976). Although often cited as part of the Court's death penalty jurisprudence, *Trop* dealt with whether Congress could punish soldiers who desert during wartime by divesting them of their citizenship. *See Trop*, 356 U.S. at 102–03.

43. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) ("The standard [for cruel and unusual punishment] remains the same, but its applicability must change as the basic mores of society change.") (citing Furman v. Georgia, 408 U.S. 238, 382 (1972) (Berger, C.J., dissenting); Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("A claim that punishment is excessive is judged . . . by those [standards] that currently prevail."). Demonstrating the changeability of societal norms (or, more cynically, of the ideological composition of the Court), both *Roper* and *Atkins* used evolving standards of decency to abrogate cases that had applied the same test and found the punishments—death for juveniles and developmentally disabled offenders, respectively—permissible. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005) (reconsidering Stanford v. Kentucky, 492 U.S. 361 (1989)); *Atkins*, 536 U.S. at 310 (reconsidering Penry v. Lynaugh, 492 U.S. 302 (1989)).

44. *See Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring in part and concurring in the judgment), *accord Atkins*, 536 U.S. at 312.

45. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010) (quoting *Roper*, 543 U.S. at 572).

46. *Id.* at 2022. A common criticism of "independent judgment" has been that it allows the

1. The Decline of Objective Evidence of National Consensus

In recent years, the Court has applied "evolving standards of decency" to strike down more juvenile sentencing schemes. At the same time, it has encountered increasingly weak evidence of national consensus against those schemes, at least in terms of legislation. In *Thompson v. Oklahoma*,[47] a late 1980s tough-on-crime boom case, the Court held that states may not execute juveniles for crimes committed before the offender turned sixteen.[48] The *Thompson* Court reviewed a death sentence that was to be imposed on fifteen-year-old William Thompson for the murder of his brother-in-law.[49] Writing for the majority, Justice Stevens remarked, "there *are* differences which must be accommodated in determining the rights and duties of children as compared with those of adults."[50] Justice Stevens observed that states almost universally treat juveniles fifteen and younger differently than they treat adults.[51] More directly, he found that no state that set a minimum age for death-penalty eligibility permitted it for juveniles younger than sixteen.[52]

Fourteen years after *Thompson*, the Court decided *Atkins v. Virginia*,[53] and categorically banned the death penalty for developmentally disabled offenders.[54] Donald Atkins, while legally an adult, had an IQ of fifty-nine[55] and possessed "the mental age of a child between the ages of 9 and 12."[56] For objective legislative evidence, *Atkins* relied both on the raw number of states that forbade capital punishment for the developmentally

majority justices to rely too heavily on their own subjective opinions. *See, e.g.*, *Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting) ("[T]he Court's assessment of the current legislative judgment . . . more resembles a *post hoc* rationalization for the majority's subjectively preferred result . . . ."); *see also* Lerner, *supra* note 18, at 330 (describing Justice Kennedy's analysis in *Graham*). Lerner writes: "Perhaps sensing how perilous the argument from state practice is, Justice Kennedy breathes more easily as he leaves objective criteria of community standards for the subjective ones." *Id.*

47. 487 U.S. 815 (1988).

48. *Id.* at 830.

49. *See id.* at 819.

50. *Id.* at 823 (emphasis in original) (citing Goss v. Lopez, 419 U.S. 565, 590–91 (1975)).

51. Justice Stevens notes: "In no State may a 15-year-old vote or serve on a jury. Further, in all but one State a 15-year-old may not drive with parental consent, and in all but four States a 15-year-old may not marry without parental consent . . . [A]ll states have enacted legislation designating the maximum age for juvenile court jurisdiction at no less than 16." *Id.* at 824 (footnotes omitted).

52. *Id.* at 829.

53. 536 U.S. 304 (2002).

54. *See id.* at 321.

55. *Id.* at 309.

56. *Id.* at 310 (quoting Atkins v. Virginia, 534 S.E.2d 312, 323 (2000) (Hassell, J., dissenting)). Atkins' developmental disability status was disputed at trial, the government instead contending that Atkins suffered from antisocial personality disorder, *id.* at 309, or, in layman's parlance, that Atkins was a sociopath.

disabled, and the rapidly expanding list of states moving their laws in that direction.[57] In total, thirty-two states and the federal government refused to execute developmentally disabled offenders at that time,[58] seventeen states having adopted that policy after 1990.[59] Moreover, "even in those States that allow the execution of mentally retarded offenders," the Court noted, "the practice is uncommon."[60]

In *Roper v. Simmons*,[61] the Court categorically eliminated the juvenile death penalty.[62] To justify its decision, the majority relied on a legislative consensus quantitatively resembling *Atkins* but lacking clear, recent movement towards abolition.[63] Justice Kennedy summarized the evidence: "30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach."[64] Again, the majority took note of state practices, observing that although twenty states permitted the juvenile death penalty at the time, only three had actually executed a juvenile in the preceding decade.[65]

Five years after *Roper*, the Court decided *Graham v. Florida*,[66] and the majority applied a death-penalty decency analysis to eliminate juvenile LWOP for non-homicide crimes.[67] *Graham* involved an offender sentenced to spend his life behind bars for an armed burglary committed when he was sixteen.[68] Writing for the majority, Justice Kennedy acknowledged that thirty-eight jurisdictions and the federal government allowed LWOP for some juvenile offenses.[69] Undeterred, Justice Kennedy

57. *See id.* at 313–15.

58. *See id.* Of those thirty-two states, thirteen banned the death penalty entirely, and nineteen specifically exempted the developmentally disabled from their death penalty statutes. *Id.*

59. *See id.*

60. *Id.* at 316.

61. 543 U.S. 551 (2005).

62. *Id.* at 574.

63. *Cf. id.* at 612 (Scalia, J., dissenting). Justice Scalia remarks: "Now, the Court says a legislative change in four states is 'significant' enough to trigger a constitutional prohibition." *Id.*

64. *Id.* at 564.

65. *See id.* at 564–65.

66. 130 S. Ct. 2011 (2010).

67. *Id.* at 2034.

68. *Id.* at 2020. The procedure of the case is a little muddled. At sixteen, Terrence Graham entered into a plea bargain at trial, whereby Graham received a three-year probation term in exchange for no adjudication of guilt. *Id.* at 2018. The next year, Graham was implicated, but never formally charged, in connection with a violent home invasion. *Id.* at 2018–19. Graham returned to court for violating his parole, where a new judge defied the recommendations of all parties involved and imposed the harshest punishment permitted under Florida law for the first robbery. *Id.* at 2019–20.

69. *Id.* at 2023.

maintained: "There are measures of consensus other than legislation."[70] Turning to state practice, he discovered that all offenders serving juvenile LWOP sentences for crimes other than homicide were incarcerated in eleven states, and more than half of them in Florida.[71] Notably, Justice Kennedy found that laws permitting trial, as adults, do not evince legislative intent to expose juveniles to LWOP.[72]

As the Court has afforded juveniles greater sentencing protections, the role legislative evidence of national consensus—once seen as absolutely pivotal[73]—has precipitously declined. Gradually, the Court has inverted the decency calculus, emphasizing independent judgments rooted in medicine, social science, and penological theory.

2. The Rise of Independent Judgments

Within the Court's two-pronged approach to the decency analysis, there is tension between the weight given to objective evidence of consensus and the Court's independent judgment. Independent judgments do not need to follow in lockstep with national consensus evidence. Indeed, the Court's independent judgment becomes more critical as signs of national consensus weaken. Indeed, the Court in *Graham* remarked: "Community consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual."[74] While acknowledging that both groups of evidence must be considered, the Court could hardly be clearer in its preference for its own independent judgment—even where little consensus exists to buttress it.[75] To the Court's credit, its rationales have been reasonable and remarkably consistent across its juvenile sentencing decisions.

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70. *Id.* (quoting Kennedy v. Louisiana, 554 U.S. 407, 433 (2008)).

71. *Id.* at 2024. The Court bases its count on a combination of a study and its own research. The overall count was subject to debate. Craig S. Lerner points out that the Court relied on a potentially flawed study. *See* Lerner, *supra* note 18, at 329. Lerner also notes that "no one knows how rarely [juvenile LWOP] is imposed." *Id.* at 330.

72. *Graham*, 130 S. Ct. at 2025.

73. *See* Harmelin v. Michigan, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("[P]roportionality review by federal courts should be informed by objective factors to the maximum extent possible.") (internal quotation marks omitted).

74. *Graham*, 130 S. Ct. at 2026 (quoting Kennedy v. Louisiana, 554 U.S. 407, 434 (2008)). *Kennedy* held that the death penalty could not be imposed when a homicide did not occur and was not intended, even when the victim was a child. *See Kennedy*, 128 S. Ct. at 2646. Notably, in *Graham*, Justice Kennedy drew useful statements from his own words in *Kennedy*'s majority opinion.

75. A cynic might argue that the independent judgment has always been the prime consideration. Even in *Thompson*, the Court described objective indicators as "confirm[ing] our judgment." Thompson v. Oklahoma, 487 U.S. 815, 823 (1988).

Much of the Court's language discussing its independent judgment has come to focus on the mental, emotional, and behavioral differences between children and adults. Quoting earlier precedents, requiring youth as a mitigating factor in juvenile capital cases, the *Thompson* Court acknowledged: "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. . . . [M]inors often lack the experience, perspective, and judgment expected of adults."[76] Thus, by the very nature of her youth, a juvenile offender is less culpable than an adult offender for the same criminal action.[77]

Subsequent cases largely echo this refrain. In *Roper*, the majority declares, "juvenile offenders cannot with reliability be classified among the worst offenders."[78] For the *Roper* majority, the life circumstances of most juvenile criminals mitigate their culpability; the Court argued that juveniles are less blameworthy "for failing to escape negative influences in their whole environment."[79] Moreover, juveniles are more likely than adults to reform their behavior as they grow and mature.[80] If juveniles are categorically less culpable, they should not be eligible for America's harshest punishment.[81]

Graham accepted *Roper*'s statements about juveniles in toto[82] and applied *Graham*'s statements to the hazier case of LWOP for juveniles who did not kill. The *Graham* Court pointed out that "life without parole is the second most severe penalty permitted by law."[83] And unlike all other sentences except death, LWOP imposes "a forfeiture that is irrevocable."[84] Weighing the criminal against the crime, the Court found that an offender

76. *Id.* at 834 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982)) (internal quotation marks omitted).

77. *Id.* at 835. Justice Stevens reasons: "The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.*

78. Roper v. Simmons, 543 U.S. 551, 569 (2005).

79. *Id.* at 570.

80. *See id.*

81. *See id.* at 572–74.

82. *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles."). Lerner takes issue with the Court's interpretation of neurological data, suggesting that Justice Kennedy was looking for a "stud[y] indicat[ing] that juveniles are, in fact, fully mature, invulnerable to peer pressure, and in possession of characteristics etched in stone." Lerner, *supra* note 18, at 330.

83. *Graham*, 130 S. Ct. at 2027 (quoting from Harmelin v. Michigan 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)) (internal quotation marks omitted).

84. *Id.*

who is a juvenile, but not a killer, cannot be placed within the second-worst class of offenders meriting the second harshest punishment.[85]

The Court has also consistently asked whether any of the accepted rationales for punishment can justify a given sentence for the given class of criminals and crime. The analysis in *Thompson*, *Atkins*, and *Roper* focused on only two potential justifications: retribution and deterrence.[86] The Court in *Gregg v. Georgia*[87] identified these justifications as the "two principal social purposes" of capital punishment.[88] *Thompson*, *Atkins*, and *Roper* each found that retribution was an inappropriate justification for offenders with reduced culpability.[89] Likewise, these cases found that deterrence does not justify the death penalty because the neurological differences between the offenders and able adults suggest that the former are less likely to consider the consequences of their actions in a way that gives the death penalty a true deterrent effect.[90]

Because the sentence was LWOP, *Graham* presented the Court with a somewhat stickier situation than its previous juvenile sentencing cases. While the previous cases raised only justifications of retribution and deterrence, the realities of LWOP brought to bear theories of incapacitation and rehabilitation.[91] The Court dispatched with retribution and deterrence as it had before.[92] With regard to incapacitation, however, Justice Kennedy found that no sentencer could say with sufficient certainty that a juvenile non-homicide offender "would be a risk to society for the rest of his [or her] life."[93] Justice Kennedy's language evokes the changeability of the juvenile character. Because juveniles are by definition works in progress, it is not possible to predict which children are

85. *See id.* ("[W]hen compared to an adult murderer, a juvenile offender . . . has a twice diminished moral culpability.").

86. *See Roper*, 543 U.S. at 570–72 (discussing penological rationales); Atkins v. Virginia, 536 U.S. 304, 318–320 (2002) (same); Thompson v. Oklahoma, 487 U.S. 815, 836–38 (1988) (same).

87. 428 U.S. 153 (1976).

88. *Id.* at 183.

89. *See Roper*, 543 U.S. at 571; *Atkins*, 536 U.S. at 319; *Thompson*, 487 U.S. at 836–37.

90. *See Roper*, 543 U.S. at 571–72; *Atkins*, 536 U.S. at 319–20; *Thompson*, 487 U.S. at 837–38. In *Thompson*, Justice Stevens states: "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Thompson*, 487 U.S. at 837. Interestingly, Stevens also notes that the general reluctance to execute juveniles even where it was legal actually lessened the deterrent effect. *See id.* at 838. This seems to have been the situation that spawned *Roper*. The offender in that case, Christopher Simmons, apparently told his accomplices that, as juveniles, they could "get away with [murder]." *Roper*, 543 U.S. at 556.

91. *See* Graham v. Florida, 130 S. Ct. 2011, 2028 (2010).

92. In these sections, the *Graham* Court cites *Roper* heavily before reaching precisely the same conclusion. *Id.* at 2028–29.

93. *Id.* at 2029.

permanently dangerous.[94] Finally, the majority noted that LWOP "forswears altogether the rehabilitative ideal."[95] Thus, while it is sometimes framed as a separate inquiry,[96] the answer to the question of penological justifications is entirely determined by the Court's initial conclusions about the fit between the culpability of the offender and the harshness of the crime.

Since the Court decided *Thompson* twenty-five years ago, its notions of what it means to be a juvenile have expanded, but the fundamental message has gone unchanged. Juveniles, by definition, are not adults, and the reality of their lives and growth make it unfair to treat them exactly as if they were.

III. *MILLER V. ALABAMA*: A DIFFERENT KIND OF DECENCY ANALYSIS

In *Miller v. Alabama*,[97] the Court held that the mandatory imposition of LWOP for crimes committed when an offender was 17 or younger constitutes cruel and unusual punishment.[98] The Court did not, however, ban juvenile LWOP outright.[99] The Court reached its holding through a relatively simple analogy: life without parole is for a juvenile much of what a death sentence is for an adult, and consequently the two punishments should have some of the same requirements.[100] The *Miller* decision is at once a natural extension of existing doctrines and a substantial analytical leap for an Eighth Amendment proportionality case. This Part illustrates such duality by sketching the Court's decision and analyzing its fundamental reasoning.

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94. Quoting himself in *Roper*, Justice Kennedy says: "These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Id.* at 2026 (quoting *Roper*, 543 U.S. at 573).

95. *Id.* at 2030.

96. For example, Justice Kennedy in *Graham* opens a paragraph by saying: "The penological justifications . . . are also relevant to the analysis." *Id.* at 2028.

97. 132 S. Ct. 2455 (2012).

98. *Id.* at 2460.

99. *Id.* at 2469 ("Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.").

100. *Id.* at 2463–64, 2466–67.

A. Crimes and Circumstances

Miller consolidated two very different homicide cases[101] and consequently involved two very different sets of facts. The petitioners, Kuntrell Jackson and Evan Miller, share the following characteristics: they are male,[102] they committed homicide offenses when they were fourteen years old, they were tried as adults, and the trial court was given no other choice but to impose LWOP.[103] Beyond these points, there is not much to bind Jackson and Miller, or their crimes, together.

1. Kuntrell Jackson

The Court presented Jackson's case largely unadorned.[104] When Kuntrell Jackson was fourteen he was involved with two older boys in an armed robbery that escalated into murder.[105] While the older boys entered a video store meaning to rob it, Jackson initially remained outside.[106] Jackson entered the store as the older boys confronted the store clerk, one of them brandishing a sawed-off shotgun.[107] The clerk threatened to call the authorities, prompting one of the older boys to shoot and kill her after which all three immediately fled.[108] Using his statutory discretion,[109] the

101. *Miller* consolidated a direct appeal, *see* Miller v. Alabama, 63 So. 3d 676 (Ala. Crim. App. 2010), and a state petition for habeas corpus relief, *see* Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011).

102. Although it has no direct Eighth Amendment significance, it is worth noting that every major sentencing case discussed in this Note involved a male offender. *See Miller*, 132 S. Ct. at 2461–62; Graham v. Florida, 130 S. Ct. 2011, 2018 (2010); Roper v. Simmons, 543 U.S. 551, 556 (2005); Atkins v. Virginia, 536 U.S. 304, 307 (2002); Thompson v. Oklahoma, 487 U.S. 815, 819 (1988). According to the Bureau of Justice Statistics, in America, eighty-eight percent of all homicides are committed by males. James Alan Fox & Marianne W. Zawitz, *Homicide Trends in the United States*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/content/pub/pdf/htius.pdf (last visited Nov. 17, 2013).

103. *See Miller*, 132 S. Ct. at 2461–63.

104. The Court neglected to provide any details regarding Jackson's life experience. The record, while sparse in Jackson's case, did include the detail that Jackson, his cousin, and the older boy, were walking through a housing project in small town Arkansas. *See* Brief for Petitioner., Jackson v. Hobbs, No. 10-9647, 2012 WL 92506, at *2 (U.S. Jan. 9, 2012); Respondent's Brief in Opposition, Jackson v. Hobbs, No. 10-9647, 2011 WL 5373676 (U.S. June 1, 2011). According to the U.S. Census Bureau, in Blytheville, Arkansas, where Jackson committed his offense, 39.1% of all families with children under eighteen live in poverty. *American FactFinder*, UNITED STATES CENSUS BUREAU, http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml (search "Community Facts" for "Blytheville, Arkansas"; then follow "Income, Employment, Occupation, Commuting to Work . . ." hyperlink) (last visited Nov. 28, 2013).

105. *Miller*, 132 S. Ct. at 2461.

106. *Id.*

107. *Id.*

108. *Id.*

109. Arkansas authorizes prosecuting attorneys to charge fourteen- and fifteen-year-olds as adults

local prosecutor charged Jackson as an adult.[110] The trial court convicted him of capital felony murder even though he was not the triggerman.[111] In Arkansas, this offense carries a mandatory sentence of at least life without parole.[112]

2. Evan Miller

Compared with Jackson, Evan Miller's case is more straightforward and is certainly more horrific, both in the narrative of the crime for which he was convicted and in Justice Kagan's tragic account of his fractured home life. Drugs, alcohol, and physical abuse affected Miller's childhood.[113] His mother was an alcoholic and a drug addict, which caused Miller to bounce in and out of foster care.[114] Eventually he began using drugs and alcohol himself.[115] By the time he finished the first grade, Miller had already attempted suicide.[116]

Miller met his victim as a consequence of his troubled upbringing; the victim approached his house to conduct a drug deal with Miller's mother.[117] After the deal, Miller and a friend drank and smoked marijuana with the soon-to-be victim.[118] When the visitor passed out, Miller attempted to rob him, rousing him angrily from his stupor.[119] Miller then sadistically beat him with a baseball bat he found and set fire to the trailer where they had been smoking. The victim remained incapacitated inside, and fire ultimately killed him.[120]

Alabama law permits a prosecutor to request removal of a juvenile case to adult court, so long as the offender was at least fourteen.[121] Because of

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under a limited list of extremely violent circumstances, including: "(A) Capital murder . . . , (B) Murder in the first degree . . . , (C) Kidnapping . . . , (D) Aggravated robbery . . . , (E) Rape . . . , (F) Battery in the first degree . . . , (G) Terroristic act." ARK. CODE ANN. § 9-27-318(c)(2) (2009). The Supreme Court of Arkansas struck down an unrelated provision of § 9-27-318 in State v. A.G., 383 S.W. 3d 317, 320 (Ark. 2011).

110. *Miller*, 132 S. Ct. at 2461.

111. *Id.* at 2468.

112. *Id.*; *see also* ARK. CODE ANN. § 5-4-104(b) (West 2013).

113. *Miller*, 132 S. Ct. at 2462.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* The victim died from a combination of blunt force trauma and asphyxiation. *Id.*

121. *See* ALA. CODE § 12-15-203(a) (2012). (formerly codified at § 12-15-34). Alabama comprehensively reorganized Title 12, Chapter 15 of the Alabama Code in 2008. *See* 2008 Ala. Acts 277.

the cruelty of the killing,[122] among other things, Miller's case was transferred out of juvenile court.[123] Tried as an adult, Miller was convicted of "murder in the course of arson."[124] Alabama's sentencing statute, like the Arkansas statute in Jackson's case, requires a minimum sentence of LWOP and makes no exception for juvenile offenders.[125]

B. "Children Are Different, Too": A Matter of 'Life Is Death'

Justice Kagan's opinion seems to regress when compared to *Graham* and *Roper*—the cases on which it most relies—opening with the Court's independent judgment rather than objective consensus evidence. After affirming that the Court is indeed looking for "evolving standards of decency,"[126] Justice Kagan explained that her decision would merge two separate lines of sentencing precedent to find *mandatory* juvenile LWOP unconstitutional.[127] In *Graham*'s adoption of the death-penalty decency analysis for a juvenile LWOP case, Justice Kagan found license and motivation to directly apply the Court's individualized sentencing requirement for death penalty cases[128] under *Woodson v. North Carolina*[129] and *Lockett v. Ohio*.[130]

Justice Kagan saw *Graham* and *Roper* as setting out a principle that children, merely by being children, "are constitutionally different from adults for the purposes of sentencing."[131] She noted that *Graham*'s conclusions about juvenile impulsivity, vulnerability, and changeability

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122. *See Miller*, 132 S. Ct. at 2462.

123. *Id.* As Miller bludgeoned the victim, he proclaimed: "I am God, I've come to take your life." *Id.*

124. *Id.* at 2462–63.

125. *Id.* at 2463; *see also* ALA. CODE §§ 13A-5-40(9), 13A-6-2(c) (1982).

126. *See Miller*, 132 S. Ct. at 2463.

127. *See id.*

128. *See id.* at 2463–64.

129. 428 U.S. 280 (1976) (plurality opinion).

130. 438 U.S. 586 (1978).

131. *Miller*, 132 S. Ct. at 2464. Despite Justice Kagan's language, it is more appropriate to refer to these offenders as "juveniles," as opposed to "children." Calling adolescents who kill "children" inadequately reflects the seriousness of homicide and has an unnecessary "polarizing effect on public discourse." Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 n.5 (2013). Adolescents deserve lesser punishments not because of what they are, but what they are not. In my view, the Court's recent juvenile sentencing cases do not create a separate Eighth Amendment for children, but simply enumerate circumstances where sentencers may not treat non-adults as adults. *Cf. Miller*, 132 S. Ct. at 2468 ("[I]n imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."). Failing to recognize this distinction lends undue credence to criticisms that the Court's juvenile sentencing decisions are reductionist.

apply with equal force whether the crime is a homicide or not.[132] Rather than stretch this conclusion to categorically bar all juvenile LWOP sentences, Justice Kagan found that "*Graham* insists that youth matters in determining the appropriateness of a lifetime incarceration without the possibility of parole."[133] When sentencing juveniles to our harshest punishments, she said, courts must consider that they are, in fact, sentencing juveniles.[134]

Next, Justice Kagan built a bridge from *Graham* and *Roper* to the Court's death-penalty precedents. Looking to *Graham*'s language about the similarities between juvenile LWOP and the death penalty,[135] Justice Kagan noted that, because of the ages involved, LWOP entails the longest actual terms of incarceration when it is imposed on the young.[136] She concluded: "In part because we viewed [LWOP] for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment."[137] For the majority's purposes, when a juvenile offender is involved, a life sentence is a death sentence.

Given her analogy to the death penalty, Justice Kagan was able to point to Eighth Amendment principles forbidding mandatory imposition of the death penalty[138] and requiring that courts consider "any mitigating factors, so that the death penalty is reserved only for the most culpable defendants."[139] The Court, she noted, has specifically required sentencers to consider youth and upbringing when deciding whether to impose the death penalty.[140] Holding fast to the analogy between life and death, Justice Kagan concluded: "In meting out the death penalty, the elision of

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132. *See id.* at 2465 ("Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing.").

133. *Id.* at 2465.

134. *Id.* at 2466.

135. *See supra* text accompanying note 84.

136. *See Miller*, 132 S. Ct. at 2466. "[T]his lengthiest possible incarceration is an 'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" *Id.* (quoting Graham v. Florida, 130 S. Ct. 2011, 2028 (2010)).

137. *Id.* To reinforce the analogy, Justice Kagan noted that, two years before *Graham*, the Court fashioned a similar death penalty rule in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), forbidding capital punishment for nonhomicide crimes against persons. *Miller*, 132 S. Ct. at 2467.

138. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

139. *Miller*, 132 S. Ct. at 2467.

140. *Id.*; *see also* Johnson v. Texas, 509 U.S. 350, 367 (1993) ("There is no dispute that a defendant's youth is a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury . . . ."); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[W]hen the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.").

all these differences would be strictly forbidden. . . . [A] similar rule should apply when a juvenile confronts a sentence of life (and death) in prison."[141] If death is indeed different, then so are juveniles.[142] While mandatory LWOP for juveniles is impermissible,[143] the majority refused to touch the question of whether all forms of juvenile LWOP were likewise unconstitutional.[144]

C. The Demise of Objective Consensus Evidence?

Several paragraphs after the Court announced its holding, the *Miller* Court finally turned to the objective prong of the "evolving standards of decency" calculus.[145] Upon making the turn, the Court had to contend with the fact that mandatory LWOP is on the books in more than half of all states.[146] The majority concluded that the unfavorable legislative head count did not impede its holding on two grounds. First, the Court explained that this holding was limited compared to prior cases—that is, it does not bar outright a particular form of punishment for a class of offenders, as *Roper* and *Graham* had.[147] Second, because statutes transferring juveniles to adult court and statutes laying out mandatory sentences for those tried in adult court are independent from one another, the Court surmised that mandatory juvenile LWOP schemes might often be the product of inadvertent interaction between the two statutes.[148]

Justices Roberts and Alito accused the majority of improperly ignoring legislative evidence and elevating its own, subjective opinion with language ranging from chiding to doom-saying. Justice Roberts claimed that the majority made a policy decision beyond its station.[149] Justice Alito, for his part, claimed that the majority completely eliminated

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141. *Miller*, 132 S. Ct. at 2468.

142. *Id.* at 2470.

143. *Id.* at 2469.

144. *Id.* Nor does it consider whether it might be cruel and unusual to ever impose LWOP on a juvenile non-triggerman, such as Jackson, prosecuted under the felony murder rule. *Cf. id.* at 2476 (Breyer, J., concurring) ("But in my opinion, this type of 'transferred intent' is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole.").

145. *See id.* at 2469–71 (majority opinion).

146. *Id.* at 2471.

147. *See id.*

148. *See id.* at 2473. Justice Roberts takes issue with what he calls "assum[ing] a legislature is so ignorant of its own laws that it does not understand that two of them interact with each other." *Id.* at 2479–80 (Roberts, C.J., dissenting).

149. *See id.* at 2482 (Roberts, C.J., dissenting). Justice Roberts writes: "Perhaps science and policy suggest society should show greater mercy to young killers, giving them a greater chance to reform themselves at the risk that they will kill again. But that is not our decision to make." *Id.* (internal citations omitted).

consideration of objective standards: "What today's decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society's standards. Our Eighth Amendment case law is now entirely inward looking."[150]

Justice Alito's conclusion is premature, as *Miller*'s holding is intentionally much narrower than its predecessors, suggesting that perhaps the majority was reluctant to go further without more legislative evidence. At the same time, the decision does evince willingness on the Court's part to build some Eighth Amendment decisions predominantly on its independent judgment, rather than to begin every decency calculation with a formulaic census of the state legislatures.

IV. THE (ACTUAL AND POTENTIAL) ROLE OF INTERNATIONAL CONSENSUS

Regarding the United States' harshest juvenile penalties, the international community speaks with one clear, disapproving voice. Controversially,[151] in its juvenile sentencing cases, the Court has generally tried to listen. *Graham*, *Roper*, and their predecessors all gave at least passing consideration to international standards as part of the Eighth Amendment decency calculus.[152] Until *Miller*, that is. For reasons they did

150. *See id.* at 2490 (Alito, J., dissenting).

151. Justice Scalia, for one, vehemently maintains that international considerations are totally irrelevant to the Eighth Amendment. In *Roper*, for example, he admonishes the Court:

> The Court should either profess its willingness to reconsider all of these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.

Roper v. Simmons, 543 U.S. 551, 627 (2005) (Scalia, J., dissenting) (emphasis in original).

Jonathan Levy likewise tacitly accuses the Court of arbitrary application of international principles in its juvenile sentencing cases for subjective reasons. *See* Jonathan Levy, Recent Development, *The Case of the Missing Argument: The Mysterious Disappearance of International Law from Juvenile Sentencing in* Miller v. Alabama, 132 S. Ct. 2455 (2012), 36 HARV. J.L. & PUB. POL'Y 355 (2013). Levy's criticism, like Justice Scalia's, seems to be rooted in the presumption that the United States does not, barring the whims of its jurists, have to honor and play by the world's rules when its lawmakers do not wish it. *Cf. id.* at 358 ("Without a constitutional mandate to consider international law in interpreting the Eighth Amendment, the decision to do so is questionable policy."). In other words, Levy criticizes courts for adhering to a policy of considering law.

152. In *Thompson v. Oklahoma*, the Court briefly surveys Western, industrialized nations to find that their conclusions about the juvenile death penalty and the Court's are "consistent." 487 U.S. 815, 830 (1988). Even *Atkins v. Virginia*, which otherwise ignores international materials, gives brief credence in a footnote to buttress its findings of national consensus. *See* 536 U.S. 304, 316 n.21 (2002) ("Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."). *Roper* and *Graham* also make comparatively extensive reference to international materials. *See generally infra* text accompanying notes 154–66.

not disclose, many of the same justices who sought out international opinion in previous cases[153] chose to fix their gaze for *Miller* firmly within U.S. borders. This may be because *Graham*—the case on which *Miller* most relies—already considered the world community's take on juvenile LWOP.[154] Or it may be because the Court wanted to avoid the appearance of directly subjugating domestic legislative determinations to international law and opinion.[155] Whatever the reason, *Miller* ignored the international angle, which had become an important part of the Court's juvenile sentencing discussion. This Part discusses how the Court has used international law in previous juvenile sentencing cases, and argues that those materials evidence a binding international norm against juvenile LWOP punishments.

A. International Consensus in Roper *and* Graham

Both *Roper* and *Graham* claim to use evidence of global consensus to verify the Court's already-reached conclusions about what punishments are cruel and unusual.[156] Accordingly, in both cases the majority discusses international materials in the closing section of its opinion.

In *Roper*, Justice Kennedy observed that, prior to the Court's holding, "the United States is the only country in the world . . . to give official sanction to the juvenile penalty."[157] He noted that the United Nations Convention on the Rights of the Child,[158] ratified by every state except the United States and Somalia, explicitly forbids imposing the death penalty

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In fact, the Court has looked to international standards for as long as it has looked for "evolving standards of decency." In *Trop v. Dulles*, the Court observed: "The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries . . . impose denationalization as a penalty for desertion." 356 U.S. 86, 103 (1958) (plurality opinion).

153. *See* discussion accompanying *supra* note 152.

154. *Cf.* Levy, *supra* note 151, at 372 (arguing that *Miller* was not "devoid of international law" because it relied on cases that considered it). *See generally* Graham v. Florida, 130 S. Ct. 2011, 2033–34 (2010) (discussing international consensus against juvenile LWOP punishments).

155. In *Roper*, Justice Scalia had complained: "Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage." *Roper*, 543 U.S. at 622.

156. *See Graham*, 130 S. Ct. at 2034 ("The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment . . . because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it."); *Roper*, 543 U.S. at 578 (majority opinion) ("The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.").

157. *Roper*, 543 U.S. at 575.

158. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

for crimes committed when the offender was younger than eighteen.[159] Next, Justice Kennedy counted the number of other states that, in practice had, executed a juvenile between 1990 and 2005.[160] He found seven—all of whom had since abandoned the punishment.[161] Justice Kennedy then turned to English law, noting "the Amendment was modeled on a parallel provision in the English Declaration of Rights of 1689," and observed that the United Kingdom had abolished the juvenile death penalty more than seventy years prior.[162] Despite a relatively thorough discussion, Justice Kennedy made no mention of a potential, binding *jus cogens* norm against the punishment.[163]

Graham's treatment of international materials largely mimics *Roper*'s. In *Graham*, the Court found that of the eleven states that officially sanctioned juvenile LWOP, only the United States and Israel ever imposed it, and only the United States for non-homicide crimes.[164] The Court again observed that the United States continued to be one of only two nations not to ratify the Convention on the Rights of the Child.[165] Unlike *Roper*, the Court took a definitive stand on the *jus cogens* question. Admitting that the Court had been briefed on the issue, Justice Kennedy wrote: "[t]he debate . . . over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import."[166] The Court simply will not touch binding rules of international law.

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159. *Roper*, 543 U.S. at 576. Article 37 of the CRC provides: "No child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below eighteen years of age." CRC, art. 37(a), 1577 U.N.T.S. at 55.

160. *Roper*, 543 U.S. at 577.

161. *Id.* Justice Kennedy writes: "In sum, it is fair to say that the United States now stands alone in a world that has turned . . . against the juvenile death penalty." *Id.*

162. *Id.* Justice Scalia takes special exception to the Court's discussion of English law, calling it "perhaps the most indefensible part of [the] opinion." *Id.* at 626 (Scalia, J., dissenting).

163. This is noteworthy because, in 2002, the Inter-American Commission on Human Rights issued a report concluding that, by sentencing minors to death, the United States was actively violating a *jus cogens* norm of international law. *See* Michael Domingues v. United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02 ¶ 112 (2002), http://www.cidh.org/annualrep/2002eng/usa.12285.htm.

164. *See* Graham v. Florida, 130 S. Ct. 2011, 2033 (2010). The Court noted that Israel technically allows juveniles sentenced to life a chance at parole, but with questionable process. *Id.* For the sake of argument, the Court assumes that Israel allows juvenile LWOP. *Id.*

165. *See id.* at 2034; *see also supra* text accompanying note 159.

166. *Graham*, 130 S. Ct. at 2034.

B. Dispositive International Consensus Against Juvenile LWOP Sentences

The Supreme Court does not look for any binding law when it enquires into "the climate of international opinion concerning the acceptability of a particular punishment."[167] In *Graham*, Justice Kennedy insisted that "[t]he question . . . is not whether international law prohibits . . . the sentence at issue."[168] In declining to ask that question, the Court has failed to use an overwhelming source of objective consensus evidence—the all-but-unanimous condemnation of juvenile LWOP the world over[169]—to its full potential. This missed opportunity is all the more frustrating when one considers that the very international law sources the Court uses persuasively in its juvenile sentencing decisions, when examined closely, actually establish binding rules of international law.

1. Custom and Jus Cogens *Norms*

The Convention on the Rights of the Child ("CRC"), acknowledged in both *Graham* and *Roper*,[170] absolutely forbids LWOP sentences from being imposed as punishment for crimes committed by those younger than eighteen.[171] While the United States has not ratified it,[172] the Convention may be nonetheless applicable in the United States if it constitutes an expression of international custom.[173] In the *Paquete Habana*[174] more than a century ago, the Supreme Court agreed that international custom is binding U.S. law in and of itself.[175] Connie de la Vega and Michelle Leighton assert that the CRC "codifies an international customary norm of human rights."[176]

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167. *Id.* at 2033 (quoting Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982).

168. *Id.* at 2034.

169. *See, e.g.*, Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 989 (2008) (observing that, as of 2008, "a single country is now responsible for 100% of all child offenders serving [LWOP]: the United States"). Notably, the *Graham* Court cited de la Vega and Leighton's work.

170. *See Graham*, 130 S. Ct. at 2034; Roper v. Simmons, 543 U.S. 551, 576 (2005).

171. CRC art. 37, 1577 U.N.T.S. at 55.

172. In *Roper*, Justice Scalia compares the Court's reference to the Convention on the Rights of the Child to judicial ratification of a treaty. *See Roper*, 543 U.S. at 622 (Scalia, J., dissenting).

173. *See* de la Vega & Leighton, *supra* note 169, at 1014 ("Once a rule of customary international law is established, that rule generally applies to all nations, including those that have not formally ratified it themselves.")

174. 175 U.S. 677 (1900).

175. *See id.* at 700. The Court writes: "International law is part of our law. . . . [W]here there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." *Id.*

176. de la Vega & Leighton, *supra* note 169, at 1009.

De la Vega, Leighton, and others go a step further, arguing that the norm against juvenile LWOP has become *jus cogens*.[177] A *jus cogens* norm differs from an ordinary norm of international law in that it is absolutely non-derogable.[178] Whereas states can avoid international custom by persistently objecting,[179] no state can escape a norm that is *jus cogens*.[180] For an international custom to be *jus cogens*, the vast majority of states must recognize the norm as something that is inviolable.[181]

Graham suggests that this "vast majority" has taken a stand against juvenile LWOP. In that case, Justice Kennedy noted that "the United States now stands alone" in imposing these sentences.[182] Ratification of the Convention on the Rights of the Child by every other nation except Somalia, suggests that the world community intends itself to be bound in its condemnation of juvenile LWOP.[183]

2. First-party Treaty Obligations

Commentators also point to the International Covenant on Civil and Political Rights[184] ("ICCPR") as a binding international law that forbids current U.S. juvenile sentencing practices.[185] The ICCPR is different from the Convention on the Rights of the Child, however, because the United States is a party to the treaty.[186]

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177. *See* de la Vega & Leighton, *supra* note 169, at 1014–18; *see also* Tera Agyepong, Note, *Children Left Behind Bars:* Sullivan, Graham, *and Juvenile Life Without Parole Sentences*, 9 NW. U. J. INT'L HUM. RTS. 83, 96–97 (2010), *available at* http://www.law.northwestern.edu/journals/jihr/v9/n1/4/Agyepong.pdf.

178. Recognized *jus cogens* norms include the norms against piracy, slavery, and torture. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 63, 68.

179. *See* Michael Domingues v. United States, Case 12.285, Inter-Am. Comm'n H.R., Report No. 62/02 ¶ 48–49 (2002); de la Vega & Leighton, *supra* note 169, at 1014 n.161.

180. *See Domingues*, Report No. 62/02 ¶ 85 ("The [*jus cogens*] norm cannot be validly derogated from, whether by treaty or by the objection of a state, persistent or otherwise.").

181. *Id.* ¶ 50. The Commission notes that a *jus cogens* norm can arise "where there is acceptance or recognition by a large majority of states, even if over dissent by a small number of states." *Id.*

182. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).

183. *Cf.* de la Vega & Leighton, *supra* note 169, at 1015–16. De la Vega & Leighton also note that the United States did not impose LWOP sentences on juveniles with any regularity until the past few decades. *Id.* at 1016.

184. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. No. 95-20 (1992), 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR functions, along with other documents, as a sort of international bill of rights, and was "the first document to formally address juvenile rights in judicial proceedings." Magnuson, *supra* note 16, at 168.

185. *See, e.g.*, de la Vega & Leighton, *supra* note 169, at 1010–11 (arguing that the United States has violated its own treaty obligations under the ICCPR).

186. *Id.* at 1010.

Article 7 of the ICCPR forbids "cruel, inhuman or degrading treatment or punishment."[187] Article 10 requires that juveniles not be housed in adult prisons and that incarceration systems embrace rehabilitation as their primary purpose.[188] Finally, Article 14(4) demands that juvenile sentencing "take [into] account . . . [the juvenile's] age and the desirability of promoting their rehabilitation."[189] Several commentators have argued that, by sentencing juveniles to LWOP (eschewing rehabilitation) in adult prisons, the United States has violated its obligations under the ICCPR.[190]

When it ratified the ICCPR in 1992, the United States included a reservation permitting it to treat juveniles as adults in "exceptional circumstances."[191] In practice, the U.S. does not honor its reservation. "Exceptional circumstances" apparently means "all the time," as U.S. ratification of the treaty coincides with an increase in the number of juveniles sentenced to life without parole.[192] Moreover, Marina Ann Magnuson argues that the U.S. reservation must be stricken because it conflicts with the treaty's object and purpose.[193] In that case, in imposing juvenile LWOP at all, the United States violates its first-party treaty obligations.

In having nothing to do with binding rules of international law, the Court's juvenile sentencing opinions have missed out on a potent source of consensus evidence for the Court's Eighth Amendment calculus, and one that would have supported a comprehensive juvenile LWOP ban in *Graham* or *Miller*. Instead, the Court appears to be unable or unwilling to shake its persistent skepticism about, and occasional outright hostility to,

187. ICCPR, art. 7, 999 U.N.T.S. at 175.

188. *See* Art. 10(c), 999 U.N.T.S. at 176 ("The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status." *Id.*).

189. Art. 14(4), 999 U.N.T.S. at 177.

190. *See* Magnuson, *supra* note 16, at 179–83; *see also* de la Vega & Leighton, *supra* note 169, at 1011 (noting that, in 2006, the Committee on Human Rights found that U.S. sentencing practice violated its treaty obligations).

191. de la Vega & Leighton, *supra* note 169, at 1010.

192. *See id.* at 1010–11 ("The extraordinary breadth and rapid development in the United States of sentencing child offenders to LWOP since the United States' ratification of the ICCPR contradicts the assertion that the United States has applied this sentence only in exceptional circumstances.").

193. *See* Magnuson, *supra* note 16, at 178–79. Under the Vienna Convention on the Law of Treaties, states ratifying a treaty may not make a reservation that is "incompatible with the object and purpose of the treaty." Vienna Convention on the Law of Treaties, May 23, 1969, art. 19(c), 1155 U.N.T.S. 331, 336–37. While not a party to the Vienna Convention, the United States recognizes much of the treaty as customary international law. *See Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm (last visited Jan. 17, 2013).

enforcing rules of international law,[194] and the United States's youths are worse off for it.

V. IS *MILLER* A LAUNCHING PAD OR A ROAD BLOCK?

From the advocate's perspective, *Miller*'s holding is a significant step in the right direction.[195] If courts, legislatures, and law enforcement officials take to heart the notion that juveniles have inherently lessened culpability, individualized sentencing may indeed make juvenile LWOP sentences "uncommon."[196] Moreover, *Miller* may serve as a springboard for applying more death-penalty protections to juvenile LWOP. Finally, *Miller*'s retroactive application could mean more humane and equitable treatment for many of the prisoners still serving LWOP sentences for juvenile actions.

Yet *Miller* falls unsatisfyingly short of a total prohibition of juvenile LWOP.[197] The decision represents a positive change, but that change may come with a price tag. By relying primarily on death penalty principles, rather than objective evidence, the Court created an analytical vulnerability that impedes a comprehensive juvenile LWOP ban for some years. Justice Kagan's language and the majority's limited holding suggest that the Court would not use its independent judgment to erect a full bar to juvenile LWOP sentences in the face of legislative evidence even more imposing than it saw in *Miller*.[198] And by analogizing juvenile LWOP to the death penalty, the Court indicated that the constitutionality of those

194. *See generally* Robert Shawn Hogue, Medellín v. Texas*: The Roberts Court and New Frontiers for Federalism*, 41 U. MIAMI INTER-AM. L. REV. 255, 287 (noting that "the Roberts Court has, and will likely continue, to devolve power from the national government over to the states at the expense of not only the federal government but the international community as well.").

195. For example, Executive Director Bryan Stevenson of the Equal Justice Institute, which represented both Evan Miller and Kuntrell Jackson, Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) (syllabus), hailed the Court's holding as "an important win for children" and "a significant step forward." *U.S. Supreme Court Bans Mandatory Life-Without-Parole Sentences for Children Convicted of Homicide*, EQUAL JUSTICE INITIATIVE (June 25, 2012), http://eji.org/node/646.

196. *Miller*, 132 S. Ct. at 2469 (2012). *But see* Berkheiser, *supra* note 16, at 490 ("History has shown, however, that the individualized consideration now required before sentencing our youth to death in prison is no friend to youth.").

197. *Cf., e.g.*, Brian Evans, *Victory: No More Mandatory Life Sentences for Children In US*, AMNESTY INT'L HUM. RTS. NOW BLOG (June 25, 2012, 12:37 PM), http://blog.amnestyusa.org/us/victory-no-more-mandatory-life-sentences-for-children-in-us/ (remarking that, while "a welcome step forward," *Miller* is not the full juvenile LWOP ban America needs).

198. According to the Campaign for the Fair Sentencing of Youth, thirty-eight states presently have inmates serving LWOP sentences for crimes committed as minors. *State by State*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, http://www.endjlwop.org/the-issue/stats-by-state/ (last visited Jan. 16, 2013).

two punishments may be linked such that, so long as states may execute the adult killer, they may throw away the key to the juvenile killer's cell. Finally, although international law would provide an objective basis to support prohibition under a traditional decency analysis, the Court seems unlikely to go down that path. Therefore, this final Part concludes that litigation directly aimed at erecting a flat, federal bar against juvenile LWOP is unlikely to be successful and that the most effective strategy for advocates is to focus on more incremental action.

A. The Limits of Independent Judgment

While Justice Alito's claim that, post-*Miller*, "Eighth Amendment cases are no longer tied to any objective indicia of society's standards"[199] at best jumps the gun, his comment highlights an important point. That is, Justice Kagan's majority opinion, by the simple fact of its organization, privileges the Court's independent judgment much more overtly than *Graham* and *Roper* do.[200] Those cases suggest that the Court's independent judgment can sometimes override a lack of legislative consensus against a punishment, if the circumstances are right.[201] But neither *Graham* nor *Roper* dared to suggest that legislative enactments can, at times, be effectively irrelevant to Eighth Amendment decency determinations.[202]

But where Justices Roberts and Alito see the beginning of a perilous journey,[203] the Court's own language suggests that it probably lacks the will to oppose sweeping legislative disapproval to reach that journey's immediate Promised Land—a categorical bar against all juvenile LWOP sentences. The *Miller* Court emphasized that substantial legislative authorization of juvenile LWOP sentences does not bar the majority's holding in part because that holding added red tape to the imposition of an otherwise constitutional sentence instead of striking down an entire field

199. *Miller*, 132 S. Ct. at 2490 (Alito, J., dissenting); *see also supra* text accompanying note 150.

200. Recall that *Miller* only addresses legislative enactments after announcing its holding. *See Miller*, 132 S. Ct. at 2469–71; *supra* text accompanying note 126.

201. *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) ("Community consensus, while 'entitled to great weight,' is not itself determinative of whether a punishment is cruel and unusual.").

202. *Cf. supra* text accompanying notes 149–50.

203. *See Miller*, 132 S. Ct. at 2481 (Roberts, C.J., dissenting) ("[T]he Court's opinion suggests that it is merely a way station on the path to further judicial displacement of the legislative role in proscribing appropriate punishment for crime."); *id.* at 2490 (Alito, J., dissenting) ("Unless our cases change course, we will continue to march toward some vision of evolutionary culmination that the Court has not yet disclosed.").

of punishment.[204] The Court, it appears, sees itself as taxing liquor rather than barring its consumption.

The *Miller* Court all but admitted its reluctance to tackle juvenile LWOP head-on. Immediately after announcing her holding, Justice Kagan acknowledged that the Court had been briefed on whether "the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger."[205] By acknowledging the broad holding the Court could have reached, Justice Kagan underscored the narrowness of the one it chose.[206] While Chief Justice Roberts and Justice Thomas viewed the Court's expressed hope that juvenile LWOP sentences will be "uncommon"[207] as laying the groundwork for further action by the Court, it can be characterized just as easily without that inherent self-interest—a mere attempt to use persuasion to effectuate broader change than the Court is willing to find compelled by the Eighth Amendment.[208]

B. The Downside of Life is Death

The Court in *Miller* reached individualized sentencing for juveniles by applying death penalty rules to juvenile LWOP sentences.[209] To bridge the gap, the Court drew a direct analogy between juvenile LWOP and the death penalty.[210] The natural implications of that analogy—should it prove to have teeth—could stifle development of a categorical ban on juvenile LWOP under the Cruel and Unusual Punishments Clause.

To be sure, the Court never precisely stated that juvenile LWOP sentences are exactly the same as death sentences in Eighth Amendment

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204. *See id.* at 2471 (majority opinion) (claiming that the Court's holding "mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty").

205. *Id.* at 2469.

206. *See id.* Admittedly, the Court's holding is not the narrowest possible under *Miller*'s facts. For example, the Court could have limited application of its holding to only offenders fourteen or younger, to only those convicted under a theory of felony-murder, *see* discussion *supra* note 144 (describing Justice Breyer's concurrence), or a combination of the two.

207. *Miller*, 132 S. Ct. at 2469.

208. Justice Roberts suspects the Court is trying to give lower courts a basis to strike down juvenile LWOP sentences so that, at some point in the future, the sentences are rare enough that the reduced number of states authorizing the punishment can support a categorical bar à la *Graham* and *Roper*. *See id.* at 2481 (Roberts, C.J., dissenting); *cf. id.* at 2486 (Thomas, J., dissenting). Elizabeth S. Scott gives these suspicions conditional credence: "This scenario is plausible, although whether the court's warning will have the influence that the dissenters feared depends in part on whether lawmakers embrace the broader lessons for juvenile crime regulation embraced in these opinions . . . ." Scott, *supra* note 131, at 11.

209. *See Miller*, 132 S. Ct. at 2467.

210. *See id.* at 2466–67.

terms. Yet, when Justice Kagan wrote that life for children is "akin to the death penalty," she seems to have meant it with some force.[211] The analogy, she emphasized, was potent enough to permit the *Graham* Court to apply death penalty rules "in a way unprecedented for a term of imprisonment."[212] She also pointed out that *Graham*'s holding was essentially the juvenile LWOP equivalent of *Kennedy v. Louisiana*, where the Court found capital punishment for non-homicides categorically cruel and unusual.[213]

The Court's description of its own analytical framework suggests that the life-death analogy will not be a passing fad. The Court explained that its holding flowed from the "confluence" of the Court's juvenile sentencing and death penalty precedent.[214] Like two rivers that come together at a confluence, the Court suggested that from this point on, juvenile LWOP and death penalty precedent have more or less combined into one stream.

Assuming the Court does indeed mean to latch on to its life-death analogy for the long haul, *Miller* could mean that the constitutionality of juvenile LWOP sentences hinges on the constitutionality of the death penalty itself. Whatever its wisdom, capital punishment remains constitutional and, although its popularity is falling, a significant majority of Americans continue to support its imposition.[215] *Miller* may well mean that, so long as the death penalty remains an available punishment, juvenile LWOP will mean no categorical Eighth Amendment ban.

Finally, the Court's life-death analogy could impede the eventual development of robust proportionality review for juveniles *and* adults. When Justice Kagan defended the Court's holding by saying that "children are different,"[216] she opened up arguments that the rules of *Miller* and *Graham* will operate as rules specific to juveniles, just as cases like

211. *Id.* at 2466.

212. *Id.*

213. *See id.* at 2467; *see also* Kennedy v. Louisiana, 554 U.S. 407, 421 (2008)

214. *Miller*, 132 S. Ct. at 2464. The Court writes: "Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violates the Eighth Amendment." *Id.*

215. A recent Gallup poll found that sixty-three percent of Americans said they were "in favor of the death penalty for a person convicted of murder." Lydia Saad, *U.S. Death Penalty Support Stable at 63%*, GALLUP.COM (Jan. 9, 2013), http://www.gallup.com/poll/159770/death-penalty-support-stable.aspx. This represents a slight increase from the previous year, when public support hit a modern low. *See* Frank Newport, *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP.COM. (Oct. 13, 2011), http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx (indicating that sixty-one percent of Americans supported the death penalty in 2011). Widespread public support for the death penalty peaked in the early 1990s at 80 percent. *Id.*

216. *See Miller*, 132 S. Ct. at 2470.

Woodson v. North Carolina[217] have been specific to capital punishment. In other words, *Miller* could simply place cases involving juveniles on the death-penalty side of the traditional, bifurcated proportionality analysis, and leave general proportionality principles unchanged. In this eventuality, the "new" Eighth Amendment would be little more than a red herring.

C. International Consensus: Low-Hanging Fruit, but Apparently Poisonous

The most direct way to escape the *Miller* Court's shortcomings would be to acknowledge the weighty, near-universal agreement across the globe that juveniles who commit crimes, even those who kill, should not be eligible for lifetime incarceration without the possibility of release.[218] The Court could easily acknowledge that international consensus and, more importantly, rules of international law may provide evidence of "evolving standards of decency." International indicia address accusations of over-subjectivity on behalf of the Court[219] because they are entirely objective evidence. One can count the number of countries forbidding a certain punishment just as easily as one can count the number of U.S. states—it just requires more fingers. Likewise, international consensus offers a rational means to move past the potentially stifling side of the Court's life-death analogy. Using international evidence, the Court could reach a comprehensive juvenile LWOP ban using the more traditional analysis it seems to prefer, all things being equal. More importantly, the Court could reach that decision yesterday.

Yet, the Court seems unlikely go down that path. As it has expanded Eighth Amendment sentencing protections, the Court has kept its distance from binding international law,[220] even making the semi-absurd contention that, even if a *jus cogens* norm against juvenile LWOP existed, it would not matter.[221] *Jus cogens* norms, by their very nature, are absolutely binding;[222] thus, to suggest that such norms do not matter is to say that they do not, and cannot, exist. For whatever reason, *Miller* neglected all international mention whatsoever.[223] Even if the Court returns to its more

217. 428 U.S. 280, 303–05 (1976) (plurality opinion) (requiring an individualized inquiry before courts may impose the death penalty).

218. *See supra* text accompanying notes 171–83.

219. *See supra* text accompanying note 150.

220. *See supra* text accompanying notes 167–68.

221. *See supra* text accompanying note 166.

222. *See supra* text accompanying note 180.

223. *See supra* text accompanying notes 151–55.

inquisitive treatment of international law and opinion, there is little reason to think its persistent resistance to binding rules will dissipate any time in the near future.

D. Viable Alternatives to an Unwilling Court

If the Court proves unwilling to take the final step to forbid juvenile LWOP across the board, the same result might be achieved gradually, state-by-state, through judicial decisions and legislation. It remains to be seen how well state courts will adhere to the spirit of the *Miller* decision, but early results are mixed.[224] Likewise, what many state legislatures will do with their now-unconstitutional sentencing statutes is unclear.[225] If advocates can carve out incremental protections at the state level, their successes could help to build a national consensus a future Court might use in the Eighth Amendment decency calculus.

Those advocating for elimination of juvenile LWOP might also find success in omnibus juvenile reform bills. A recent report by the Attorney General's Task Force on Children Exposed to Violence recommended, among other things, wholesale changes to the way the United States treats

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224. For example, state courts are split over whether *Miller* should means anything for prisoners still serving mandatory juvenile LWOP sentences. Despite the fact that the *Miller* Court applied its holding to Kuntrell Jackson's collateral challenge, state courts disagree about the decision's general retroactivity. *See generally, e.g.*, Chambers v. State, 831 N.W.2d 311 (Minn. 2013) (not retroactive); Jones v. State, No. 2009-CT-02033-SCT, 2013 WL 3756564 (Miss. July 18, 2013) (retroactive); State v. Ragland, 836 N.W.2d 107 (Iowa 2013) (retroactive); People v. Williams, 982 N.E.2d 181 (Ill. App. Ct. 2012) (retroactive); People v. Carp, 828 N.W.2d 685 (Mich. Ct. App. 2012) (not retroactive); Geter v. State, 115 So. 3d 375 (Fla. Dist. Ct. App. 2012) (not retroactive). There is similar disagreement among the federal courts. *Compare In re* Morgan, 713 F.3d 1365 (11th Cir. 2013) (not retroactive) *with* Hill v. Snyder, No. 10-14568, 2013 WL 364198 (E.D. Mich. Jan. 30, 2013).

For the most part, courts finding *Miller* not to apply retroactively consider it a purely procedural case. *See Chambers*, 831 N.W.2d at 326–30. To be sure, the *Miller* Court professes to require a new "process." Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012). But a purely procedural view seems rather short-sighted—while *Miller* does deal with process, it also substantively restricts the power of government. *See* Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. JOURNAL (Aug. 8, 2012, 7:30 AM), http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/ ("[T]he *Miller* court [sic] did more than change procedures; it held that the government cannot constitutionally impose a punishment.").

Retroactivity litigation could provide an opportunity for juvenile advocates to gain additional ground in the states. *See, e.g.*, *Ragland*, 836 N.W.2d at 121–22 (holding that *Miller* also applies to de facto LWOP sentences—term-of-years sentences that are so long as to span the offender's entire life).

225. For a database, though perhaps slightly outdated, of state responses to *Miller*, *see generally Life Without Parole for Juveniles: States and Courts Weigh In*, PEW CHARITABLE TRUSTS (Aug. 26, 2013), http://www.pewstates.org/research/data-visualizations/life-without-parole-for-juveniles-states-and-courts-weigh-in-85899500114.

children and teens accused and convicted of crimes.[226] Influenced by *Miller*, one of these recommended changes was an end to harsh, adult criminal punishments for juveniles.[227] Legislation aimed not just at more humane criminal punishments, but also improving options for rehabilitation in the juvenile system[228] and providing more support to offenders particularly vulnerable to violence,[229] might galvanize greater popular support.

Finally, further litigation on juvenile LWOP issues short of a comprehensive ban might be successful, both in affording juveniles greater protections and in galvanizing support for an eventual ban. For example, challenging the imposition of LWOP on juveniles convicted as accessories to homicide or under the felony-murder doctrine could be a successful starting point.[230] Justice Breyer endorsed this position in his concurring opinion in *Miller*.[231] Advocates who choose to take this path should carefully consider how arguments rooted in death penalty precedent might further entrench the Court's life-death analogy. They should avoid mechanically applying death penalty cases, instead arguing from the principles that underlay those cases. Lastly, regardless of whether death penalty law obtains, advocates might always remind their courts that an international consensus is out there, should those courts choose to use it.

CONCLUSION

Miller v. Alabama represents a substantial step towards a more humane system of juvenile criminal sentencing under the Eighth Amendment. Regrettably, its reasoning and limited holding force one to question whether a judicially mandated end to juvenile LWOP sentences is in the

226. *See* ATT'Y GEN.'S NAT'L TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE, *supra* note 33, at 110–25.

227. *See id.* at 124 ("We should stop treating juvenile offenders as if they were adults, prosecuting them as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore their capacity to grow.").

228. *See id.* at 114–15.

229. *See id.* at 116–19.

230. For articles outlining these arguments, see generally Michael Anderson, Note, *The Eighth Amendment and Juvenile LWOP: Applying the* Tison *Standard to Juvenile Peripheral Accomplices*, 82 MISS. L.J. SUPRA 329 (2013), *available at* http://mississippilawjournal.org/wp-content/uploads/2013/04/4_Anderson_Comment_FINAL.pdf; Mariko K. Shitama, Note, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813 (2013)

231. *See supra* note 144 (discussing Justice Breyer's take on juvenile LWOP for accessorial liability).

short-term cards. This does not mean that advocates for juvenile justice should cease pushing for such a categorical bar in litigation. But it does mean that they should temper their expectations about what constitutional claims are likely to accomplish. They should give added focus to pressuring legislators to take cues from the Court and Attorney General and enact reformed sentencing policies that fully acknowledge children's diminished culpability and greater capacity for rehabilitation and growth. They should push for juvenile sentencing schemes that will bring the United States in line with international standards. And they should seek laws and rulings that forbid or discourage sentencers from throwing away the key. Advocates should not, however, expect the Supreme Court to come to the rescue in the interim.

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